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No. 86-525

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NAL CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, IN OPPOSITION

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RESPONDENT'S STATEMENT OF INTEREST IN THE CASE

Respondent NAL Chapter, Flight Engineers International Association was one of the parties granted a limited right of intervention in the district court in 1983. Pet. 1 & n.3; Pet. App. A2 & n.3; Pet. App. A12, A30-

A31. Prior to the 1980 acquisition of National Airlines by Pan American World Airways, the NAL Chapter had been the exclusive bargaining representative for all National Airlines flight engineers. At the time of the Pan Am-National merger, the integration of the two airlines' cockpit crew seniority lists and bidding structures became the subject of an arbitration proceeding which culminated with the March 12, 1981, final and binding Award of Arbitrator Lewis M. Gill.

In pertinent part, Mr. Gill's Award provided, in essence, that each pre-merger airman group would exercise on the merged Pan Am the same range of bidding options as had been available to the respective groups prior to the merger. As a result, pilots and flight engineers who came to Pan Am by virtue of the National merger continue to be eligible to bid only pilot (that is, captain and first officer) positions or only flight engineer positions; no former National flight engineer may hold a pilot position, and no former National pilot may hold a flight engineer position. Pre-merger Pan Am airmen continue to exercise the same bidding rights for all three cockpit crew positions as they had on Pan Am prior to the merger.

Since the effective date of the Pan Am-National merger, the bargaining representative for all Pan Am flight engineers, including those from National Airlines, has been the PAA Chapter, Flight Engineers International Association. Under the terms of agreements between the PAA Chapter and the NAL Chapter, the NAL Chapter has continued to represent the distinct interests of former National Airlines flight engineers in those limited areas where the National engineers' interests are not congruent with those of the former Pan Am engineers.

The consent decrees proposed in this case presented one such area. The injunctive provisions in those decrees would require Pan Am to provide flight engineer

positions to a class of retired Pan Am pilots, and, prospectively, to all Pan Am pilots[1] as they reach the age at which federal regulations prohibit their continued employment as air transport pilots. *See* Pet. 3; 14 C.F.R. § 121.383(c). Because the NAL Chapter believed that the injunctive relief provided in the consent decrees would impermissibly damage the career expectations and employment security of former National flight engineers, the NAL Chapter sought and was granted leave to intervene for the purpose of opposing the consent decrees in the district court.

On Pan Am's appeal from the district court's disapproval of the second consent decree, the NAL Chapter challenged the court's appellate jurisdiction, and filed a brief addressed only to the jurisdictional issue. In the decision Pan Am now asks this Court to review, the court of appeals adopted the arguments put forth by the NAL Chapter. The NAL Chapter therefore believes it is obliged to respond to the petition which calls that decision into question. The NAL Chapter continues to believe that the relief proposed in the rejected decrees would impermissibly impinge upon the legitimate employment expectations of former National flight engineers. The present petition raises no issue bearing on those concerns, however, and they therefore require no further discussion here.

REASONS FOR DENYING THE WRIT

In the decision petitioner asks this Court to review, the court of appeals refused to elevate to the level of "serious, perhaps irreparable, consequence," *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955), petitioner's failure to secure district court approval of a proposal to settle this case on terms petitioner found

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[1] No such right would be extended to former National pilots under the proposed decrees.

commodious. Petitioner's claim (Pet. 10-15) that the court of appeals' analysis runs directly afoul of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), reflects a fundamental misunderstanding of *Carson*. The claim depends upon the unprecedented proposition that an employer charged with unlawful age discrimination has an enforceable right to compromise and settle that claim, even though the trial court has found that the terms of the proposed settlement do not sufficiently effectuate the remedial purposes of the statute involved. Nothing in *Carson* suggests that defendants have the same rights to secure inferior settlements of employment discrimination suits as plaintiffs have to secure, by settlement where possible, fully adequate settlement of such claims. *Carson* held only that a district court's denial of the latter right may, under some circumstances, be reviewed on appeal under 28 U.S.C. § 1292(a)(1), and the court of appeals quite correctly declined petitioner's invitation to impute to *Carson* a concern for the former claim of right as well. Because the court's decision is fully consistent with *Carson*, and because no other court of appeals has, upon consideration of the arguments petitioner now advances, taken a different view, there is no occasion for this Court to examine the court of appeals' decision. The petition should therefore be denied.

1. In *Carson*, a Title VII suit[2] alleging employment discrimination on account of race, plaintiffs had successfully negotiated a class settlement under the terms of which the defendants agreed to implement certain systemic, remedial measures intended to combat the ongoing effects of the employer's past discrimination. In particular, the employer had agreed

> to give hiring and seniority preferences to black employees and to fill one-third of all supervisory

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

> positions in the Richmond Leaf Department with qualified blacks.

Carson, 450 U.S. at 81.

Believing that the affirmative relief the consent decree would have provided was itself unlawful, the district court refused to approve the decree. The district court informed the parties, moreover, that even if plaintiffs were to succeed at trial in demonstrating that the employer's past practices had been unlawful, it would order only individual, victim-specific relief; the court made clear that it would not order the sort of class-wide affirmative relief which the consent decree had contemplated.

This Court held that the district court's merits-based rejection of the affirmative remedial relief plaintiffs had sought, and the employer had agreed to provide, effectively denied to plaintiffs

> the injunctive benefits of the settlement agreement they negotiated.

Id. at 89. Because the district court had made clear that no such broad-based injunctive class relief would be available in that court, the Court concluded that

> any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause [plaintiffs] serious or irreparable harm (footnote omitted).

Id. Noting that plaintiffs' complaint had sought both preliminary and permanent injunctive relief, and had alleged that the denial of injunctive relief would cause them irreparable harm, *id.* at 89 & n.15, the Court concluded that the district court's order was one which might have caused plaintiffs to suffer irreparable harm, and thus was immediately appealable under 28 U.S.C. § 1292(a)(1).[3]

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[3] The Court's conclusion that perpetuation of the racially discriminatory employment practices present in *Carson* might cause

Petitioner's interest in this case is of a wholly different character from the plaintiffs' interests implicated in *Carson*. First, and most obviously, petitioner's interest—that of an employer whose employment practices have been challenged as unlawful—is a private one. Unlike the claims of the *Carson* plaintiffs, petitioner's claim is in no sense pressed to "vindicat[e] a policy that Congress considered of the highest priority (footnote omitted)." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Instead, petitioner's interest in pursuing the settlement which the district court disapproved is a privately-motivated, wholly defensive one which must be presumed to arise from its judgment that the terms of that settlement are, from its perspective, quite favorable.[4]

Furthermore, while it is true that petitioner joined the EEOC in the motion for entry of the consent decree, there is no sense in which petitioner sought and was refused injunctive relief within the meaning of section 1292(a)(1). The only prayer for injunctive relief asserted by any party was the prayer for a permanent injunction in EEOC's complaint. The permanent injunction which EEOC sought would have run against "Pan Am, its officers, agents, employers, successors, assigns and all persons in active concert or participation with it" (Third Amended Complaint, p. 4). Not surprisingly, the injunctive provisions in the rejected consent decree tracked the

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plaintiffs irreparable harm reflects the legislated priority, embodied in Title VII, assigned to the elimination of such practices. Indeed, some courts have concluded that "irreparable injury should be presumed from the very fact that [Title VII] has been violated." *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969).

[4] The district court believed petitioner's potential financial liability to the class of retired pilots in whose interest EEOC brought the action might conservatively be estimated at $26.7 million. Pet. App. A22. The cash settlement rejected by the district court—$1.5 million—thus would have represented payment of less than six cents per dollar of potential liability.

injunctive relief for which EEOC prayed in its complaint.[5] Petitioner's joining of the motion for approval of the decree thus represented no more than its acquiescence to the entry of a permanent injunction against it. Under these circumstances, there is no sense in which the district court's refusal to approve the decree "truly denies Pan Am injunctive relief." Pet. 10.[6]

Nor is there any sense in which petitioner can show that the district court's action threatens it with irreparable harm, as *Carson* requires to establish appellate jurisdiction under section 1292 (a) (1). The "irreparable consequence" element of the *Carson* analysis is the touchstone for determining whether an order refusing injunctive relief

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[5] Both petitioner and the EEOC informed the court of appeals on brief that the injunctive provisions in the proposed decree provided all the injunctive relief sought in the complaint. *See* Brief of EEOC at 16; Reply Brief of Pan American at 16. Unlike the monetary relief which the district court found insufficient, the burden of the injunctive relief proposed fell not on petitioner, but on incumbent flight engineers.

[6] Petitioner's lame reliance on its cross-claims against the unions to show that it was refused injunctive relief is clearly unavailing. Any need petitioner may have expressed for relief against the unions was contingent upon the entry of injunctive relief against petitioner. As the court of appeals explained, Pet. App. A4-A5, petitioner did not seek and does not require any modification of its cockpit collective bargaining agreements until such time as a court requires it to take actions which are inconsistent with those agreements. Because no such order has been entered, petitioner has not been refused the relief it conditionally sought against the unions.

Moreover, the nature and extent of any protection petitioner may require in this regard cannot be determined until the nature and extent of any injunctive relief awarded to the EEOC is determined. Because *that* decision has not yet been made, the district court's refusal separately to enjoin the unions (an action petitioner never suggested) is clearly an "[o]rder[] that in no way touch[es] on the merits" of petitioner's claim for relief against the unions. *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

> has the same effect ("serious, perhaps irreparable, consequence," in the language of an earlier case) as the denial of a preliminary injunction.

Donovan v. Robbins, 752 F.2d 1170, 1174 (7th Cir. 1985).

Petitioner attempts, Pet. 14, to satisfy this test by asserting that it

> will be forever foreclosed from settling on the terms provided for in the consent decree and forced to trial.

There is, we submit, no "right" guaranteeing that an employer whose practices are challenged as being in violation of federal law will not be "forced to trial." As this Court has aptly observed,

> [t]he expense and annoyance of litigation is part of the social burden of living under government.

Federal Trade Commission v. Standard Oil Co. of California, 449 U.S. 232, 244 (1980), *quoting Petroleum Exploration, Inc. v. Public Service Comm.*, 304 U.S. 209, 222 (1938); *United States v. Western Elec. Co.*, 777 F.2d 23, 30 (D.C. Cir. 1985). Nor, we think, do defendants in employment discrimination cases enjoy any "right" to compromise such challenges on terms which they find favorable. The statutes under which such cases are brought are remedial in nature, designed to protect classes of employees and potential employees from the adverse consequences of illegal employment discrimination. The analysis by which the Court in *Carson* concluded that the plaintiff class was threatened by irreparable harm obviously reflects the remedial character of the statute under which the *Carson* plaintiffs claimed. To suggest, as petitioner does, that an identity of interest exists between plaintiffs in employment discrimination cases who seek to enforce rights created by these remedial statutes, and defendants who are charged with violating them, is to ignore the very purposes for which the statutes were enacted. Plaintiffs have a legally protectable right to be free from the prohibited types of discrimina-

tion, and to be made whole for any harm such discrimination causes them. Employers such as petitioner, on the other hand, obviously are not among the classes of persons for whose benefit these statutes were enacted; they are, instead, obliged by those laws to eliminate the practices the statutes prohibit, and to make good any losses their employees have suffered because of the prohibited practices. Such employers do not have any statutorily-protected right to compromise such claims, or to insulate themselves from whatever costs and burdens their compliance with the law may require. Thus petitioner's loss of the opportunity to settle this case for a small fraction of its potential liability is just that—a lost opportunity. It does not represent a loss of right or entitlement of any sort, and it cannot constitute the sort of harm or threatened harm for the prevention of which section 1292(a)(1) created the "limited exception to the final-judgment rule," *Carson*, 450 U.S. at 84. The court of appeals' rejection of petitioner's appeal was thus fully consistent with *Carson*, and need not be disturbed by this Court.

2. Petitioner's claims (Pet. 8, n.9, 10-11, 18-21) that the decision of the court of appeals presents conflicts among the circuits is readily rebutted. The only one of the cases petitioner cited in which appeal was taken by a defendant and opposed by the plaintiff is *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973). In that case, however, appellee moved for summary affirmance before any briefs were filed, and the court of appeals granted that motion. The court's brief reported opinion affirming that summary disposition reflects no consideration of the question of appellate jurisdiction. Presumably because no party raised the question of jurisdiction, and because summary affirmance made it unnecessary in any event further to consider the merits of the appeal, the court apparently did not believe the issue merited separate attention. The

decision can, under these circumstances, hardly be said "squarely [to] conflict[]," Pet. 8-9, n.9, with the decision below. Nor can the question of whether a defendant has standing under *Carson* to maintain an appeal accurately be characterized as a "recurring" one, Pet. 9, n.9, given petitioner's inability to locate any other reported consent decree decision in which the defendant's appellate standing was an issue.

The only other cases petitioner cites in purported demonstration of an important conflict are cases in which the plaintiff appealed the district court's disapproval of the decree. *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985) (appeal by plaintiff Secretary of Labor and settling defendants); *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984) (before *Carson*, plaintiffs had attempted to appeal from district court refusal to approve consent decree). As in *Carson*, moreover, the courts' refusal to approve the decrees in both *Donovan* and *Santana* resulted from merits determinations which operated to deny to appealing plaintiffs the benefits of the injunctions to which defendants had agreed. *See Donovan*, 752 F.2d at 1178 (district court's "analysis rests on a (thoroughly understandable) misconception of the confused and confusing law of contribution"), and *Santana*, 714 F.2d at 1174 (district court rejected proposed decrees as unduly "disruptive of the Commonwealth's juvenile justice system"). Both *Donovan* and the decision below are entirely consistent with *Carson* and with one another, as is the *Santana* court's regret that plaintiff's earlier appeals in that case had been dismissed.

Petitioner finally claims that the decision below presents a conflict over the proper construction of the "collateral order" doctrine under 28 U.S.C. § 1291.[7] The

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[7] Petitioner did not identify 28 U.S.C. § 1291 as a basis for invoking appellate jurisdiction in its docketing statement in the

conflict upon which petitioner relies, however, was resolved by the court of appeals in the very decision petitioner asks this Court to review. As the court of appeals noted, Pet. App. A6, n. 7, the earlier Ninth Circuit decision in *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), stood for the proposition that the issue of whether a consent decree should be approved was itself "a collateral issue completely distinct from the merits of the case," *id.*, and thus appealable of right under section 1291. Other appellate courts had declined to follow the *Norman* lead, however, *see, e.g., Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978) (district court's refusal to approve stipulation of settlement not appealable under 28 U.S.C. § 1291) and *State of New York v. Dairylea Cooperative, Inc.*, 698 F.2d 567 (2d Cir. 1983) (refusal to approve decree not automatically appealable under 28 U.S.C. § 1292(a)(1)), and more recent Ninth Circuit decisions have recognized this Court's limitations of the "collateral order" doctrine. *In re Benny*, 791 F.2d 712, 719 (9th Cir. 1986), *Eluska v. Andrus*, 587 F.2d 996, 1000 (9th Cir. 1978). *Carson* clearly establishes that not all refusals to approve consent decrees are appealable, and to that extent implicitly rejects the contrary rule which *Norman* had seemed to represent. In overruling *Norman* therefore, the court of appeals has done no more than to recognize the analytical conflict between *Norman* and *Carson*, and to correct Ninth Circuit decisional law on the subject accordingly. In sum, the decision below does not represent a conflict over the correct construction either of 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1).

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court of appeals, or in its opening brief in that court. *See* Rule 13(b)(1)(C) of the Rules of the Court of Appeals for the Ninth Circuit.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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